

Emerging Trends in
Employment &
Labour Law

*Off Duty Misconduct and
Social Media*



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Presentation Overview

1. Off-duty misconduct generally
2. When can you discipline for off-duty misconduct?
3. Evaluating the impact to the employer
4. Selecting the appropriate measure of discipline
5. Social media and off-duty misconduct
6. Practical considerations and tips




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Off-Duty Misconduct

Generally speaking, an employee cannot be disciplined for off-duty misconduct unless:

1. the misconduct has a *real and material connection* to the workplace; and
2. the employer can prove that the misconduct has seriously prejudiced or injured its reputation or legitimate business interests.

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Is it Disciplinable? – Original Test

The *Millhaven Fibres* test:

To discipline an employee for misconduct away from the workplace, there is an onus on the employer to show that the misconduct:


1. harms the employer's reputation or product;
2. renders the employee unable to perform his/her duties satisfactorily;
3. leads to refusal, reluctance, or inability of the other employees to work with him/her;
4. amounts to a serious breach of the Criminal Code and therefore results in injury to the general reputation of the employer and its employees; OR
5. places difficulty in the way of the employer properly carrying out its function of efficiently managing its works and efficiently directing its working forces.

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Is it Disciplinable? – Reformulated Test

To discipline an employee for off-duty misconduct, the misconduct must either:

1. negatively impact the employer's reputation;
2. cause the employee to be unable to discharge employment obligations properly;
3. cause other employees to refuse to work with the individual; OR
4. adversely affect the employer's ability to direct or efficiently manage the production process.

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Is it Disciplinable? – The Test, Generally

- The test is objective - what would a reasonable and fair-minded person think if apprised of all of the relevant facts?
- Would the continued employment of the employee damage the reputation of the employer to the extent that continued employment is impossible or untenable? (*Toronto District School Board v. Canadian Union of Public Employees, Local 4400*)

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Evaluating Impact to the Employer

The context, including the nature of the employee's position and the employer's operation, is important in assessing impact to the employer's business interests.

- Does the employee work unsupervised?
- Is the employee in a significant position of trust?
- Is the employee permitted unsupervised access to clients or client property?
- Is the employee a professional? Could their behavior be in breach of their code of professional conduct?

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Selecting Appropriate Measure of Discipline

If, after applying the test, it is determined that the off-duty misconduct is disciplinable, the misconduct is dealt with the same way on-duty misconduct is dealt with.

- The level of discipline must be proportionate to the harm.
- The threshold for just cause termination is the same as any other misconduct; the conduct must be wholly incompatible with the continuation of the employment relationship to warrant termination for just cause.

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Just Cause


TWO PATHS TO JUST CAUSE

Very Serious Misconduct:

- Theft
- Assault
- Serious Dishonesty

Lesser Forms of Misconduct typically require:

- Progressive written disciplinary warnings, and
- Culminating incident


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Off-Duty Social Media Activity, Generally

The Canadian Charter of Rights and Freedoms – Freedom of Expression – does not shield an employee from being disciplined or terminated for inappropriate off-duty social media activity.

Common scenarios:


1. Creation of a Poisonous Work Environment
2. Breach of the Duty of Loyalty
3. Breach of Privacy and/or Confidentiality

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Off-Duty Social Media Activity, Generally

Important factors to consider:

<ul style="list-style-type: none">• Damage to business (direct or indirect)• Damage to workplace• Threatening nature• Frequency and duration	<ul style="list-style-type: none">• Refusal to remove• Dishonesty• Lack of remorse• Lack of provocation
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Lougheed Imports v. UFCW, Local 1518

- Creation of poisonous environment and breach of duty of loyalty
- 2 unionized employees employed by an automotive dealership
- Employees made degrading and sexually explicit Facebook posts about their supervisors
- Employees lied about authoring the posts
- Employer's decision to terminate the employees for just cause upheld
- No expectation of privacy when posting on social media

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Lougheed Imports v. UFCW, Local 1518

- If somebody mentally attacks you, and you stab him in the face 14 or 16 times...that constitutes self defence doesn't it????
- Completely Exploded & SNAPPED on the Fixed Ops/Head Prick at work today ...He sent me Home (With Pay) and wrote me up (Strike 1)... although the f**N gloves are off now ...I gotta control my temper. One strike in 4 years aint bad, I guess.
- ... According to this reprimand at work My outburst yesterday was threatening and didn't allow The WestCoastAutoGroup to conduct regular business.... well?????!! I Gotta say is they p***** off the WRONG GUY ...big time
- Seems my Boss, whos owned the business 25 yrs & is fixed operations director of 2 dealerships as well...HE'S A COMPLETE JACK... not just Half-a-Tard
- Is wondering if his 2 supervisors at work, go to the bathroom together?? And who holds who's p**s while p**ing??
- I heard that Marco and [FX] [two supervisors] were seen fondling each others n**k in the shop bathroom?? Any truth to that? That shop ripped off a bunch ppl I know
- ...none of the stereo s**t I bought there works, at all...Deck only plays store bought discs and subs are blown and amp is fried, again. ..
- west coast detail and accessory is a f**** joke...dont spend your money there as they are f**** crooks and are out to hose you...there a bunch of greedy c***** low life scumbags...

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Credit Valley Hospital v. CUPE, Local 3252


- Breach of privacy and/or confidentiality
- Unionized employee employed by a hospital
- Employee was tasked with cleaning up a scene where a patient had sadly jumped to his death from the hospital's parking garage
- Employee took 2 photos of the scene with his cell phone and posted them on his Facebook page along with captions/commentary, and 1 day later he deleted the photos
- Employee admitted to taking 1 photo, but he initially lied about taking 2 photos and posting the photos on Facebook
- Employer's decision to terminate the employees for just cause upheld

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Practical Considerations and Tips

1. Introduce a social media policy addressing:
 - personal use at work and consequences for use during working hours;
 - personal use outside of work (i.e. off-duty);
 - when an employee can be disciplined for social media use; and
 - who is authorized to communicate on behalf of the employer on social media.
2. Continue to communicate this message through ongoing training and education of your employees.
3. Diligently follow and apply the social media policy.

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Practical Considerations and Tips

4. Remember that the test for termination for cause is the same and the threshold is high. A properly drafted termination clause in your employment agreement that permits without cause terminations on Employment Standards minimums helps you part ways with employees at less cost.
5. If a situation like this arises, seek experienced legal advice as appropriate action will vary based on specific facts and context.

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Questions?

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